IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2709 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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BRIJESH ALIAS MUNNA ALIAS TAKLU PRABHUNATH TRIVEDI

Versus

COMMISSIONER OF POLICE

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Appearance:

1. Special Civil Application No. 2709 of 2001

MS KRISHNA U MISHRA for Petitioner

MR HL JANI, Learned AGP for Respondents

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CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 23/07/2001

ORAL JUDGEMENT

1. Heard Ms.K.U.Mishra, learned advocate appearing on behalf the petitioner and Mr.H.L.Jani, learned AGP appearing on behalf of the respondents.

2. In this petition under Article 226 of the

Constitution of India, the order of detention dated 12/12/2000 passed by the detaining authority has been challenged by the petitioner. The order of the detention has been passed by the Commissioner of Police, Ahmedabad City under Section 3(1) of Prevention of Anti-Social Activities Act, 1985 (hereinafter be referred to as "the PASA Act"). The present petitioner has been detained as a Class-II detenu in District Jail, Nadiad. The ground of detention has been communicated and supplied to the present petitioner under Section 9(1) of the PASA Act. According to the ground of detention, two offences have been registered against the present petitioner under the provisions of the Bombay Prohibition Act. The offences have been registered on 12/2/2000 and 20/11/2000. The statements of the secret witnesses were recorded by the concerned Police Inspector on 10/12/2000 and the same were recorded by the detaining authority on 11/12/2000. The petitioner was enlarged on bail by the Competent Authority. The last offence was registered against the present petitioner on 20/11/2000. The representation has been submitted by the petitioner at page-59 dated 22/3/2001, the same is received by the State Government on 22/3/2001 and the reply has been given to the petitioner on 30/3/2001 and the representation has been rejected by the State Government on 27/3/2001. The respondent - detaining authority has filed reply in Letters Patent Appeal No.481 of 2001.

3. In the present petition, this Court (Coram : S.K.Keshote,J.) has passed an order on 25/4/2001 and the present Special Civil Application No.2709 of 2001 is allowed with a direction to set aside the order of detention dated 12/12/2000 passed by the Commissioner of Police, Ahmedabad. The said order has been passed on 25/4/2001. The State of Gujarat has challenged the same before the Division Bench of this Court by way of filing Letters Patent Appeal No.481 of 2001. The detaining authority has filed affidavit-in-reply in Letters Patent Appeal No.481 of 2001 which has been taken into account while deciding the present Special Civil Application.

4. Before the Division Bench of this Court, the Letters Patent Appeal No.496 of 2001 in Special Civil Application No.1000 of 2001 with Letters Patent Appeal Nos.497, 498 and 481 of 2000 with Special Civil Application Nos.6157, 6159 and 572 of 2001, have been heard by this Court (Coram : Hon'ble Chief Justice Mr.D.M.Dharmadhikari and Mr.K.R.Vyas,J.) and they have been decided on 28/6/2001. The Hon'ble Division Bench has set aside the order passed by this Court (Coram : S.K.Keshote,J.) on 25/4/2001 and has directed to send the

cases to the appropriate learned Single Judge for final hearing of the matter at an early date. The Hon'ble Division Bench of this Court has also observed that the affidavit-in-reply is now placed on the record of the appeals and, therefore, it is made clear that no further notice will be required to be issued to the respondents in the main Petition. The Hon'ble Division Bench of this Court has passed an order without entering into the merits of the main matter. Therefore, the present petition again came up for final hearing before this Court. Therefore, this Court has now considered the merits of the detention order as under.

5. Ms.K.U.Mishra, learned advocate for the petitioner has raised various contentions to the effect that the privilege claimed by the detaining authority under Section 9(2) of the PASA Act is without examining the genuineness of the statements made by the secret witnesses. No further detailed inquiry has been carried out by the detaining authority and merely the fear, which has been pointed out by the secret witnesses, is believed by the detaining authority and only on that basis, the privilege has been claimed by the detaining authority not to disclose the names and addresses of such secret witnesses which definitely adversely affected the legal right of the petitioner for making effective representation under Article 22(5) of the Constitution of India. The relevant contentions raised in para-(12) of the petition are quoted as under :-

"12. The petitioner states and submits that the respondent No.1 has claimed privilege under Section 9(2) of the PASA Act, there is a mechanical and malafide exercise of power under Section 9(2) of the PASA Act and hence, it would also vitiate the subjective satisfaction and the exercise of the rights on the grounds of non-application of mind. The petitioner further submits that the two witnesses have not requested the respondent No.1 that their indentity should be withheld. They have stated that they are under the apprehension of insecurity and, therefore, their names and addresses and businesses should be withheld. In the grounds of detention, the detaining authority has mentioned that the witnesses have requested not to disclose the indentity. The said witnesses have not stated that their indenity should not be disclosed. Therefore, this would show of total non-application of mind on the part of the respondent No.1, consequently, exercise of

privilege under Section 9(2) of the PASA Act is involved, resulting into infraction of the provisions of Article 22(5) of the Constitution of India, and right to make an effective representation is violated, add thus an effective representation is violated, add thus the continued detention of the petitioner-detenu has become illegal and the same is required to be quashed and set aside by this Hon'ble Court.

6. As against the contention which has been raised by the petitioner in para-(12) of the petition, the reply has been filed by the detaining authority and paras-(11) and (13), internal page-(5) are quoted as under :-

Para-(11)

With respect to para 10 of the petition, I say that the detaining authority received proposal for detaining the detenu on 10/12/2000. I say that after carefully scrutinizing the proposal, the correctness and genuineness of the statements made by confidential witnesses, was made by me on 11/12/2000 for verifying the statements made by them. I say that confidential witnesses were called on 11/12/2000 and after being subjectively satisfied by the same the detention order was passed by me on 12/12/2000. I say that I have applied my mind to the statements made by the confidential witnesses and also the relevant records before passing the detention order. I, therefore, deny the contention raised by the petitioner regarding non-application of mind as alleged. I reiterate that the detention order was passed against the petitioner to prevent him from disturbing the maintenance of public order. I deny that there was no time between verification and detention order. Rest of the contents of the para is denied.

Para-13

With respect to para 12 of the petition, I say that the confidential witnesses had given their evidence on a condition that their names and addresses would not be disclosed to the detenu, since they were afraid of the fact that if their names and addresses would be disclosed their lives and properties would be endangered. I say that, therefore, in public interest I had

claimed privilege under Section 9(2) of the Act. I deny that the said privilege is in any way mechanical or malafide as alleged or at all. I deny that the claim of privilege under Section 9(2) is in any way infraction upon the provisions of Article 22(5) of the Constitution of India as alleged or at all. I deny that the petitioner's right to make effective representative is in any way violative as alleged or at all. I deny that the petitioner's detention order requires to be quashed and set aside by this Hon'ble Court as alleged or at all."

7. Ms.K.U.Mishra, learned advocate for the petitioner has relied upon three decisions of this Court in the cases of Kalidas Chandubhai Kahar v/s. State of Gujarat & Ors., reported in 1993 (2) G.L.R. 1659, Chandrakant N. Patel v. State of Gujarat & Ors., reported in 1994 (1) G.L.R. 761 and Ranubhai Bhikhabhai Bharwad (Vekaria) v/s. State of Gujarat & Ors., reported in 2000 (3) G.L.R. 2696.

8. Ms.Mishra has also submitted that before claiming of privilege under Section 9(2) of the PASA Act, some extra care is required to be taken in public interest by the detaining authority so as not to disclose the names and addresses of the secret witnesses. The learned advocate for the petitioner has also submitted that merely an apprehension has been pointed out by the secret witnesses while giving the statement that if they disclose the identity, their lives and properties will be endangered by the petitioner. According to her submission it is not sufficient to claim privilege under Section 9(2) of the PASA Act not to disclose the names and addresses of the secret witnesses under the guise of privilege. If it is not genuinely supported by some material, then such privilege bound to have adverse affect on the petitioner of effective representation available under Article 22(5) of the Constitution of India. The learned advocate for the petitioner has also submitted that it is not necessary and it is not sufficient ground for withholding the disclosure of such particulars and materials. But if, after considering the general background, character, antecedent, criminal tendency or propensity, etc., of the detenu and the reluctance of the witnesses who gave the statements against the detenu, the detaining authority is satisfied about the necessity of withholding some particulars or materials, then the detaining authority can certainly claim privilege under Section 9(2) of the PASA Act. The learned advocate for the petitioner has also submitted

that in the present case, looking to the affidavit-in-reply, the detaining authority has relied merely on the statements of the secret witnesses pointing out the fear against the present petitioner and, therefore, the names and addresses and other particulars as well as materials have not been disclosed by the detaining authority to the petitioner. Therefore, the learned advocate for the petitioner has further submitted that this is not sufficient for claiming of privilege under Section 9(2) of the PASA Act and, therefore, the order of detention has been passed by the detaining authority in a mechanical and arbitrary manner. The learned advocate for the petitioner has further submitted that it is also necessary to note that statements of the two secret witnesses were recorded by the concerned Inspector on 10/12/2000 and the same has been verified by the detaining authority on 11/12/2000 and on the very next day without examining the genuineness of the secret witnesses in a hasty manner, with non-application of mind the order of detention has been passed by the detaining authority. Therefore, in between, there was no time with the detaining authority to examine the genuineness of the fear which has been pointed out by the secret witnesses. Not only that but the criminal offences which have been registered against the present petitioner, past history of the petitioner and other relevant materials have not been taken into account while passing the detention order. Therefore, according to her submission, on the aforesaid ground, the order of detention is required to be set aside because it has violated Section 22(5) of the Constitution of India.

9. Mr.H.L.Jani, learned APP appearing on behalf of the respondents has submitted that the contentions which have been raised by the learned advocate for the petitioner has rightly been replied by the detaining authority. Mr.Jani has also submitted that the detaining authority has filed affidavit-in-reply in Letters Patent Appeal No.481 of 2001 and the same has been taken into account while deciding the present petition. Mr.Jani has relied upon paras - (11), (13) and (14) of the affidavit-in-reply. Mr.Jani has also submitted that the detaining authority has applied his mind and also considered the statements of the secret witnesses and the fear which has been pointed out by each witnesses against their lives and properties and, therefore, the names and addresses and other materials, the statements of the secret witnesses rightly has not been disclosed by the detaining authority and the privilege has been rightly claimed by the detaining authority under Section 9(2) of the PASA Act. Therefore, Mr.Jani has further submitted

that looking to the offences which have been registered against the present petitioner and considering the ground of detention whereby, two unregistered offences have been registered against the petitioner, then it reflects to the effect that the entire material has been taken into account by the detaining authority while claiming privilege under Section 9(2) of the PASA Act. According to him, the order of detention has rightly been passed by the detaining authority which is legal and valid and, therefore, no interference is required by this Court.

10. I have considered the submissions of both the learned advocates which are on record to the effect that the statements of secret witnesses were recorded on 10/12/2000 and the same has been verified by the detaining authority on 11/12/2000 and on the very next day, the order of detention has been passed by the detaining authority. Two unregistered offences have been registered on 23/11/2000 and 26/11/2000 by the detaining authority. It is also necessary to note that two offences, which have been registered against the present petitioner, relate to the provision of the Bombay Prohibition Act and the petitioner was enlarged on bail by the Competent Court. Therefore, in light of these facts, it is to be decided whether the detaining authority has applied his mind while passing the detention order as well as claiming of privilege under Section 9 (2) of the PASA Act. Looking to the ground of detention it is clear that the privilege has been claimed by the detaining authority as found on internal page-(3) of running page-(19). The detaining authority has observed to the effect that looking to the facts and statements made by the secret witnesses before the detaining authority, the fear which has been pointed out by each secret witnesses are correct and, therefore, in public interest, the detaining authority has claimed privilege under Section 9(2) of the PASA Act and has not disclosed the names and addresses and other materials to the petitioner of the secret witnesses. Therefore, considering the ground of detention, the observations which are referred above made by the detaining authority it is clear that no other material about the seriousness of the offences, past history of the detenu, general background, character, antecedent, criminal tendency or propensity etc., has been taken into account by the detaining authority. It is also necessary to note that in the reply, which has been submitted by the detaining authority in para-(13), a specific reply has been given by the detaining authority to the effect that the confidential witnesses had given their evidence on a condition that their names and addresses would not be

disclosed to the detenu, since they were afraid of the fact that if their names and addresses would be disclosed their lives and properties would be endangered and, therefore, according to the detaining authority in public interest, the detaining authority claimed privilege under Section 9(2) of the PASA Act and, therefore, it will not adversely affect the right of the petitioner. Looking to the contention which has been raised in the present petition in para-(12) and the reply which has been given by the detaining authority in para-(13) and looking to the fact that the statements of the secret witnesses were recorded on 10/12/2000 and the same has been verified by the detaining authority on 11/12/2000 and further looking to the ground of detention, the privilege has been claimed by the detaining authority, only on account of the fear that has been pointed out by the secret witnesses about their lives and properties. Therefore, it is necessary to refer to the decision of the Division Bench of this Court in the case of Kalidas Chandubhai Kahar v. State of Gujarat & Ors., reported in 1993 (2) G.L.R. 1659, the relevant para-(6) is quoted as under :-

"6. His second contention is that the detaining authority has wrongly exercised the powers under Sec.9(2) of PASA Act and by such wrong exercise of powers the detenu, right to make a representation under Art.22(5) of the Constitution has been infringed. He further elaborates his submission by pointing out that the statements of the witnesses have been recorded on 16th October, 1992 and that the said statements have been verified by the Superintendent of Police, C-Division, Baroda City on 16th October, 1992. it has been pointed out by the learned A.G.P. Mr.Y.M.Thakkar that the proposal in the case was made on 16th October, 1992 and the order of detention was passed on 17th October, 1992. it is rather curious that the entire bunch of material was supplied by the sponsoring authority at the time of making the proposal and that has been promptly accepted by the detaining authority and passed the order on the next day itself. At the time of exercising the privilege under Sec.9(2) of PASA, a balance is required to be struck between the public interest on the one hand and the right of the detenu to make a representation under Art.22(5) of the Constitution on the other. If the statements of the witnesses are to be relied on, they must be genuine statements of the real persons. The detenu would like to verify as to

whether these persons are fictitious persons or not and/or whether their statements are bogus statements or not ? Unless the detenu knows the names and addresses of the persons who have given the statements, he cannot verify the aforesaid facts and if the names and addresses along with the contents of the statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation on that basis. As against this, there is a provision under Section 9(2) carved out on the basis of Art.22(5) of the Constitution which provides that nothing in sub-sec.(1) shall require the authority making such order to disclose facts which it considers to be against the public interest to disclose. Therefore, it is the duty of the detaining authority to strike a balance as stated above, that in the public interest, the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it affects the public interest on the one hand and the right of the detenu on the other. When that is so, the detaining authority is expected to do some exercise before actually exercising the privilege under Sec.9(2) of PASA. Looking to the facts and circumstances of the case, it is clear, as stated hereinbefore, that the verified statements were also placed before the detaining authority and there was no sufficient time for the detaining authority to examine the possibility of exercising the power under Sec.9(20, as the proposal was made on 16th October, 1992 and the order of detention was passed on the following day, i.e. 17th October, 1992, nor is there any material to show as to how he examined the necessity of exercising the power under Sec.9(2). Under the circumstances, in our view, it is a wrong exercise of power under Sec.9(2) which has affected the detenu's right of making an effective representation under Art.22(5) of the Constitution of India and, therefore, the continued detention of the detenu is bad and illegal and the impugned detention order is required to be quashed and set aside."

11. It is also necessary to refer to the decision of the Full Bench of this Court in the case of Chandrakant N. Patel v. State of Gujarat & Ors., reported in 1994 (1) G.L.R. 761. The full Bench of this Court has considered this question in detail while relying upon two

decisions in the case of Balkrishna Kashinath Khopkar v. The District Magistrate, Thana, reported in 1956 (58) BLR 614 and Bai Amina v. State of Gujarat, reported in 1981 G.L.R. 1186. The observation has been made in the case of Bai Amina v. State of Gujarat, reported in 1981 G.L.R. 1186 by this Court in respect of the meaning of "full satisfaction". The observations made by this Court are important, which are quoted as under :-

> "The mere fact that relevant particulars and materials are furnished to the detaining authority in confidence by some person is not by itself a sufficient ground for withholding the disclosure of such particulars and materials, if those materials and particulars have been relied upon against the detenu and the disclosure of such materials and particulars would assist the detenu in making an effective representation against his detention. The private promise of confidentiality must yield to the general public interest that is served by communication of such particulars and materials to the detenu in order to enable him to make an effective representation against his detention. Confidentiality is not a head of privilege; it is consideration to bear in mind only if a more important public interest is served by protecting the particulars and materials from disclosure to the detenu either by reason of the nature and character or class of such particulars and materials or on account of a clear, certain and imminent danger of the sources of such particulars and materials drying up due to fear of reprisal, thus rendering the very exercise of power of detention nugatory. Documents such as cabinet minutes, confidential dispatches of departmental or inter-departmental authorities or papers involving the security of the State or diplomatic relations are a class of documents which it would be damaging to the national interest to divulge and there confidentiality is to be safe-guarded in the national interest. If the disclosure of the particulars and materials and the sources from which they are obtained is not to be made on the ground of promise of confidentiality made to the informant in view of his apprehension that he would be visited with dire consequences if the detenu came to know that he was the source from which the particulars and materials were gathered, the detaining authority must be fully satisfied that the apprehension expressed by the

informant is honest, genuine and reasonable in the circumstances of the case. The general background, character, antecedent, criminal tendency or propensity, etc., of the detenu and such of those matters as are relevant in the context of the informant must be inquired into and carefully examined by the detaining authority with a view to satisfying itself that the alleged apprehension is not imaginary or fanciful or that it is not merely an empty excuse invented by the informant, inter alia, to protect himself against the falsity of his version being exposed by an effective explanation of the detenu or to hide his own involvement or to conceal his enmity with the detenu. The detaining authority must be further satisfied that the promise of protection against reprisal would not be an effective substitute for the promise of confidentiality and that unless confidentiality is guaranteed, material information would not come forth making it impossible to exercise the power of detention. If the promise of confidentiality has been extended by a subordinate or outside authority and the detaining authority entertains a reasonable doubt about the validity of such promise on the facts and in the circumstances of the case, or even where such promise is extended by the detaining authority but, upon a reconsideration, the detaining authority feels, while furnishing the grounds, that the promise could not have been validly extended, it would be his constitutional and statutory obligation to make disclosure of the relevant materials and particulars to the detenu, notwithstanding the promise. A mere moral obligation arising out of such a promise cannot be pressed into serve even by the informant who cannot complain of the betrayal of trust, if the public interest or public welfare is to be served by making the disclosure. The maxim 'salus populi supreme lex' (regard for the public welfare is the highest law) is relevant in this connection. The maxim is based on the principle that there is an implied assent of every member of the society that his own individual welfare shall, in cases of necessity, yield to that of the community, and that his property and life shall, under certain circumstances be placed in jeopardy or even sacrificed for the public good."

12. After considering the meaning of "full

satisfaction" as observed by this Court, the full Bench of this Court has further considered this question in para-(5), which are quoted as under :-

" On careful reading of the said decision, it can be said that the ratio of the decision is that the privilege under Sec.8(2) of the National Security Act can be claimed by the detaining authority only when it is properly and genuinenly satisfied that it is against public interest to disclose the facts which are withheld while communicating the grounds of detention to the detenu, and that while deciding whether it is necessary to withhold the materials, facts and particulars to the detenu on the ground that it will be against public interest to do so, another public interest which requires disclosure of all the relevant materials and particulars on which the order of detention is based with a view to affording an adequate opportunity of making an effective representation to the detenu against the order of detention must be borne in mind and the delicate balance between the two must be maintained. if the privilege is claimed bona fide and after proper application of mind, then the detenu cannot legitimately complain that he has been deprived of his right to make an effective representation because of the vagueness of the grounds of detention. The observations which have been made by this Court in that case as regards the promise of confidentiality, etc., are by way of elaboration as to what can be regarded as sufficient or not sufficient for the purpose of arriving at the bona fide satisfaction of the detaining authority in that behalf.

13. Thereafter, the full Bench of this Court after considering the ratio of both the decisions has come to the conclusion at para-(7) of the judgment, which are quoted as under :-

"7. If we examine the decisions in the case of Bai Amina and in the case of Balkrishna closely, it becomes clear that what has been briefly stated as the correct legal position as regard the nature and extent of the privilege in the case of Balkrishna, has been more elaborately stated in the case of Bai Amina. The inconsistency appearing in the said two decisions is more superficial than real. in the case of Balkrishna, the right of the detenu has been

described as a matter of private interest whereas in the case of Bai Amina, this Court has regarded that interest as "another public interest" and this according to the learned Additional Public Prosecutor, is the basic inconsistency in the said two decisions. In Balkrishna's case, the interest of the detenu has been described as a private interest while considering reasonableness of the restriction on the fundamental right of the citizen. The context in which the said right has been described as a matter of private interest becomes clear from the following observation made by the court in that case :

"...But as a privilege can only be claimed in public interest, the Constitution has placed public interest above the private interest even though the private interest may mean the liberty of the citizen."

Thus, the said observation came to be made by the Court in Balkrishna's case keeping the detenu in mind while the observation which has been made by this Court in Bai Amina's case is with reference to the nature and extent of the constitutional right of the detenu when he is detained by way of preventive action. In a case where a person is detained by way of a preventive action, it is the liberty of an individual detenu which is involved and in that sense, it can be said that it is a matter of private interest and not public interest. But the right of the person so detained is recognized as a fundamental right by the Constitution and taking away of such right can only be in public interest. Adversely affecting liberty and such a right, therefore, can properly be regarded as a matter of public interest. We are, therefore, of the opinion that there is no inconsistency between the ratio of the division bench decision in the case of Balkrishna and the ratio of the decision of the division bench in the case of Bai Amina. We are also of the opinion that even otherwise also, it cannot be said that Bai Amina's case does not lay down good law. As stated above, the observation which have been made as to when and how the privilege can be claimed are made with a view to show what can be regarded as proper application of mind to all the relevant aspects; what can be regarded as sufficient for the purpose of claiming privilege; and, when exercise of the

privilege can be regarded as bona fide. Whether that privilege has been exercised bonafide and properly or not obviously will have to be decided in each case by reference to the facts of that case. In the case of Balkrishna and also in the case of Bai Amina it has been so held. Considering the law relating to preventive detention, the nature of the right conferred on the detenu and the circumstances under which that right can be adversely affected, we do not think that what has been held in Bai Amina's case is not good law. Whether the detaining authority can be said to have applied its mind to all the relevant aspects properly or not would be a question of fact in each case and will have to be decided with reference to the facts of that case. Since the satisfaction in this behalf has to be of the detaining authority, obviously, the promise of confidentiality given by the person recording the statement cannot by itself be regarded as sufficient ground for withholding the disclosure of such particulars and materials. But if, after considering the general background, character, antecedent, criminal tendency or propensity, etc., of the detenu and the reluctance of the witnesses who gave the statements against the detenu, the detaining authority is satisfied about the necessity of withholding some particulars or materials, then it cannot be said that the same was not done in public interest, and that public interest likely to be subserved by non-disclosure did not outweigh or override the public interest intended to be served by disclosure of the relevant particulars and materials to the detenu."

13. Recently, this Court has also examined this very issue, in the case of Ranubhai Bhikhabhai Bharwad (Vekaria) v. State of Gujarat & Ors., reported in 2000 (3) G.L.R. 2696 and the following observations are also important, which are quoted as under :-

" After referring to Kalidas C. Kahar v. State of Gujarat, 1993 (2) GLR 1659 the Court observed :

The statements of the three witnesses in the instant case which were recorded before the Police Inspector on 17th August, 1999, 21st August 1999 and 25th August 1999 with regard to the incidents dated 10th July 1999, 13th June

1999 and 26th June 1999 were the material along with the proposal which is said to have been made on 27th August 1999 and it is clear from the record that it was on 29th August, 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August 1999 at any time prior to 29th August 1999 and on 29th August 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e. on 30th August 1999 the detention order has been passed.

The manner in which the verification has been recorded of the statements made by these three witnesses for the purpose of Sec.9(2) shows that the same has been done only as an empty formality inasmuch as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever the statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts and had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Sec.9(2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division bench that it is a case of wrong exercise of power under Sec.9(2) and it is established that in such cases, the wrong exercise of power under Sec.9(2) adversely affects the detenu's right of making an effective representation guaranteed under Art.22(5) of the Constitution of India.

Once the materials are placed before the detaining authority with the proposal by the sponsoring authority, it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the

> balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege under Sec.9(2) of the Act and also to come to the conclusion that the detenu was required to be detained immediately. in the facts of the present case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August, 1999 i.e. on the next day to the date on which the materials were considered by the detaining authority."

14. I have considered these three decisions; one is of full Bench, second is of Division Bench and third is of single judge of this Court. While keeping in view the facts of the present case that two unregistered offences were registered against the present petitioner, which are relating to the Bombay Prohibition Act wherein the petitioner was enlarged on bail by the Competent Court, no other serious incident has been mentioned in the ground of detention except these two unregistered offences, as mentioned above, wherein no details have been given. In the present case, the detaining authority has claimed privilege under Section 9(2) of the PASA Act only on the ground that the secret witnesses have pointed out the fear about their lives and properties before the detaining authority and, therefore, the privilege has been claimed. This observation is made by the detaining authority in the ground of detention. But before claiming privilege by the detaining authority under Section 9(2) of the PASA Act, the detaining authority has not considered the general background, character, antecedent, criminal tendency or propensity, etc. of the detenu and without considering this aspect, straightway merely on account of fear which has been pointed out by the secret witnesses about their lives and properties, the privilege has been claimed by the detaining authority. Looking to the facts of the present case, only individual offences have been registered against the present petitioner and the same offences have been under the provisions of the Bombay Prohibition Act, wherein the petitioner has been enlarged on bail by the Competent Court. In the ground of detention, no general background, character, antecedent, criminal tendency or propensity etc., of the detenu has been taken into account. Not only that, in the affidavit-in-reply, the

detaining authority has also not discussed this aspect. Therefore, in absence of such materials which are required to be taken into account while claiming privilege under Section 9(2) of the PASA Act, on the next day without examining the genuineness of the statements or without holding the detailed inquiry about the statements of the secret witnesses, straightway the privilege has been claimed by the detaining authority and decided not to disclose the names, addresses and other materials to the petitioner. According to my opinion, the detaining authority has not properly applied its mind and privilege claimed under Section 9(2) of the PASA Act is not genuine and not in the public interest because, there was no such discussion in the ground of detention and no such discussion is there in the affidavit-in-reply, which has been filed by the detaining authority and, therefore, the subjective satisfaction is not established on the record not to disclose the names, addresses and other materials to the detenu while claiming the privilege under Section 9 (2) of the PASA Act. According to my opinion, such denial of privilege has definitely adversely affected the right of the detenu of making effective representation under Article 22(5) of the Constitution of India and, therefore, according to my opinion, in the present case, the order of detention is required to be quashed and set aside.

15. For the aforesaid reasons, the petition succeeds and the same is allowed. The order of detention dated 12/12/2000 is vitiated and resulted in quashing and set setting aside the same. The detenu Brijesh @ Munna Taklu Prabhunath Tivari, who has been detained at District Jail, Nadiad, be set at liberty forthwith, if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct service is permitted.

(H.K.Rathod,J.)

V.R.Panchal